

MEE YING ENTERPRISE JEWELLERS

v.

CHE JAH ABDULLAH

HIGH COURT MALAYA, KOTA BHARU

IDRIS YUSOFF J

[CIVIL SUIT NO. 23-69-88]

17 AUGUST 1991

CIVIL PROCEDURE: *Local jurisdiction - Definition of - Courts of Judicature Act 1964, ss. 3, 23(1).*

CIVIL PROCEDURE: *Setting aside of writ for an alleged lack of jurisdiction - Effect of entry of unconditional appearance - Whether such an appearance had the effect of waiving any objection on the question of jurisdiction - Whether the appellant had submitted to the jurisdiction of the Court.*

The respondents' (plaintiffs') claim against the appellant (defendant) was founded on a breach of contract arising out of a series of commercial transactions between the two parties.

Respondent served a writ of summons dated 27 April 1988 on the appellant. As no appearance was entered judgment in default was entered for the respondent. However, the said judgment was set aside with consent of the respondent upon appellant's application.

Subsequently, on 30 August 1988, the writ was served on (appellant) whereupon unconditional appearance was entered on behalf of appellant by Messrs. C. Jegathesan on 3 September 1988.

On 29 September 1988, the respondent filed an application for summary judgment. On 3 October 1988, the appellant filed her defence and on 10 October 1988 filed an affidavit resisting the respondent's application for summary judgment.

On 30 November 1988, the appellant filed an application by way of summons-in-chambers for stay of proceedings and/or delivery of decision scheduled for 4 December 1988. In this application the appellant for the first time raised the question of jurisdiction.

Although the summons was filed on 30 November 1988, it was only issued out of the Court's registry on 12 December 1988, by then the SAR had delivered his decision on the O. 14 application in which he granted the appellant conditional leave to defend the claim - The condition being that the sum was required to be deposited by the appellant into Court within 21 days from the date of order and upon default the respondent would be at liberty to enter final judgment.

Against the said order, the appellant on 5 December 1988, filed a notice of appeal to Judge in chambers.

However, a final judgment was entered for the respondent on 16 January 1989, for the sum of RM204,275 on the failure of the appellant to deposit the said sum into Court.

On 18 April 1990, the SAR dealt with the question of jurisdiction, whereupon he held that the Court in Peninsular Malaysia had jurisdiction to determine the claim.

The (appellant) appealed against the said decision which was subsequently dismissed. Hence her appeal to the Supreme Court.

- a** Central issues in this case are:
- (i) what is the effect of the unconditional appearance *vis-a-vis* the question of jurisdiction
 - (ii) whether the local Courts have jurisdiction to determine the claim.

Held:

- b** [1] The entry of unconditional appearance by the appellant has the effect of waiving any objection she might have on the question of jurisdiction and in the final analysis it could be said that she had submitted to the jurisdiction of the Court.
- [2] From the facts, it clearly shows that both parties never intended to abdicate the jurisdiction of the Malaysian Court. Thus, Malaysian Court had jurisdiction to determine the claim.
- c** [3] The respondent had a *prima facie* right to choose where to file the suit. The choice should not be interfered with except perhaps on clear ground of injustice or inconvenience.
- [Appeal dismissed with cost.]*

Cases referred to:

- d** *Government of Singapore v. Poh Eng Kiat* [1967] 1 MLJ 157 (**cit**)
- Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd.* [1975] 2 MLJ 115 (**cit**)
- Lam Kok Trading Co. Pte. Ltd. & Anor. v. Yorkshire Switchgear and Engineering Co. Ltd.* [1976] 1 MLJ 239 (**cit**)
- Keymer v. Reddy* [1911] 1 KB 215 (**cons**)
- Malayan Banking Bhd. v. International Tin Council and Another Appeal* [1989] 1 CLJ (Rep) 87 (**cons**)
- e** *Elf Petroleum S.E. Asia Pte. Ltd. v. Winelf Petroleum Sdn. Bhd.* [1986] 1 MLJ 177 (**cit**)
- The Fehmarn* [1957] 2 All ER 707 (**cit**)

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 23(1), 23(1)(b)

Rules of the High Court 1980, O. 14

Other source referred to:

- f** *Mallal's Supreme Court Practice*, 2nd Edn., p. 68, para. 12/1/4
- For the appellant - C. Jegathesan; M/s. C. Jegathesan*
- For the respondent - Foo Say Ghee; M/s. Say Ghee & Zamzuri*

JUDGMENT

- g** **Idris Yusoff J:**
- The respondents' (plaintiffs) claim against the appellant (defendant) was founded on a breach of contract arising out of a series of commercial transactions between the two parties. The sum claimed was RM204,275 being the balance due for jewellery sold and delivered by the respondents to the appellant at the latter's request, together with interest at the rate of 8% per annum from 17 December 1987, to the date of realisation.
- h** To recover the alleged debt the respondents served a writ of summons dated 27 April 1988, on the appellant. As no appearance was entered judgment in default was accordingly entered for the respondents as prayed. However on the application of the appellant the said judgment was set aside by consent of the respondents.
- i**

On 30 August 1988, the writ was properly served on the appellant whereupon unconditional appearance was entered on behalf of the appellant by M/s. C. Jegathesan on 3 September 1988. On 29 September 1988, the respondents filed an application for summary judgment under O. 14 of the Rules of the High Court 1980, the said application was supported by the affidavit of one Mr. Loh Kim Mee affirmed on 15 September 1988. On 3 October 1988, the appellant filed her defence and a week later, that is, on 10 October 1988, filed an affidavit resisting the respondents' application for summary judgment. The O. 14 application was heard by Senior Assistant Registrar on 27 November 1988 but was postponed to 4 December 1988 for decision.

In the meantime on 30 November 1988, the appellant filed an application by way of summons-in-chambers for stay of proceedings and/or delivery of decision scheduled for 4 December 1988. In this application the appellant for the first time raised the question of jurisdiction. She alleged that as the entire dealings occurred in the Republic of Singapore, a foreign country, the Court in Peninsular Malaysia had no jurisdiction to deal with such matter. Be it noted that although the summons was filed on 30 November 1988, it was only issued out of the Court's registry on 12 December 1988, by then the Senior Assistant Registrar as scheduled had delivered his decision on the O. 14 application in which he granted the appellant conditional leave to defend the claim - The condition being that the full sum was required to be deposited by the appellant into Court within 21 days from the date of the order and upon default the respondents would be at liberty to enter final judgment. Against the said order the appellant on 5 December 1988 filed a notice of appeal to Judge in Chambers. However a final judgment was entered for the respondents on 16 January 1989 for the sum of RM204,275 on the failure of the appellant to deposit the said sum into Court.

Following the application for stay of proceedings the appellant on 17 December 1988 also filed an application to amend her defence. However, by reason of the decision on O. 14 application having been made, the applications for stay and also for amendment had not been heard by the Senior Assistant Registrar. When on 26 February 1990 the appellant's appeal came before me, I directed the Senior Assistant Registrar to deal also with the question of jurisdiction.

The respondents subsequently filed an affidavit in response to the appellant's affidavit of 29 November 1988. On 18 April 1990, the Senior Assistant Registrar dealt with the question of jurisdiction, whereupon he held that the Court in Peninsular Malaysia had jurisdiction to determine the claim.

Being dissatisfied with the said decision the appellant appealed to me and after hearing submissions from both Counsel I dismissed the appellant's appeal with costs. Hence her appeal to Supreme Court.

Mr. C. Jegathesan for the appellant in his submission contended that the contract of sale was concluded in Singapore contrary to what was claimed by the respondents. His argument was that although in the invoices prepared by the respondents, the prices therein quoted were in Malaysian ringgit, this in itself was insufficient to bring the respondents' claim to Malaysian Court as it was a common practice for instance in most of the dealings in Thailand involving Malaysians, payments were in Malaysian currency. It was clear, as argued by Counsel, from the facts that all purchases and so were the deliveries of the goods were done in Singapore. Hence the claim could only be pursued in the Singapore Court.

a In regard to the letter of 15 November 1987 which contained an admission by the appellant of owing the respondents the sum claimed, Counsel maintained that it was not done on her own volition - It was “extracted” from the appellant by the respondents’ solicitors in the event it could not be said that the appellant had agreed to submit to the jurisdiction of the Malaysian Court. Mr. C. Jegathesan also referred to s. 3 of the Courts of Judicature Act 1964-The definition of “local jurisdiction”-which sets out:

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- (a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johor, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Trengganu; and
 - (b) in the case of the High Court in Borneo, the territory comprised in the Borneo States, namely, Sabah and Sarawak,

c including, in either case, the territorial waters and the air space above those States and the territorial waters;

In the context of the above definition it was clear according to Counsel that if the Court were to hold that the sale could not be deemed to have taken place in Malaysia then the claim could not come within the jurisdiction of the Malaysian Court notwithstanding at the initial stage the appellant accepted service of the writ of summons and statement of claim.

d It was further submitted that what ought to have been done in this case, following the case of *Government of Singapore v. Poh Eng Kiat* [1967] 1 MLJ 157, it would be for the respondents to file the suit in Singapore and upon obtaining leave for service out of jurisdiction should have it served on the appellant. And again relying on the case of *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd.* [1975] 2 MLJ 115, Counsel maintained that the present suit could only be brought in Singapore Court as there did not seem to be any evidence to suggest that either the respondents or any of their branches carried on business in Malaysia - likewise no such evidence to show the appellant had carried on business in Singapore or that she had been resident there.

e Mr. Foo Say Ghee for the respondents quite apart from asserting that the contract was concluded in Malaysia as the facts would show, maintained that in the circumstances the claim could be filed in Malaysian Court having regard to what had initially taken place, not to mention that the statute had conferred such jurisdiction on the High Court. His argument substantially centred on:

- f**
- (i) the entry of unconditional appearance on 3 December 1988 by the appellant and
 - (ii) the jurisdiction of the Malaysian Court as conferred by s. 23(1) of the Courts of Judicature Act 1964.
- g**

(i) *Entry of unconditional appearance*

One way of setting aside the writ for an alleged lack of jurisdiction was by the entry of a conditional appearance followed by an application by summons to set it aside.

h As stated earlier the appellant had on 3 September 1988 entered unconditional appearance to the writ. It was argued by Counsel for the respondents that such an appearance had the effect of waiving any objection she might have on the question of jurisdiction and in the final analysis it could be said that she had submitted to the jurisdiction of this Court. Counsel also referred to the commentary in *Mallal’s Supreme Court Practice*, 2nd Edn., p. 68 para. 12/1/4 which clearly stated that the effect of unconditional appearance “is a waiver of any

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irregularity there may be and a submission to the jurisdiction of the Court ...” but not in the case of a nullity as where the Court had no jurisdiction at all to adjudicate on the matter. However it was contended in this case that the Malaysian Court had such jurisdiction.

Abdul Hamid J (as he then was) in *Lam Kok Trading Co. Pte. Ltd. & Anor. v. Yorkshire Switchgear and Engineering Co. Ltd.* [1976] 1 MLJ 239 allowed an application to set aside the writ of summons and of subsequent proceedings on the ground that the Court in Malaysia had no jurisdiction to deal with the matter - so were the two cases cited by Counsel for the appellant namely *Government of Singapore v. Poh Eng Kiat* [1967] 1 MLJ 157 and *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd.* (*supra*) where the Court set aside services of the writs on the defendants following their entries of conditional appearance and subsequent applications for setting aside.

An English case of *Keymer v. Reddy* [1911] 1 KB 215 was also pertinent. In that case the Court of Appeal made it clear the effect of conditional appearance. The headnote reads:

A defendant who objects to the jurisdiction has an absolute right to appear under protest. The practice of the Master in dealing with an appearance under protest of allowing the defendant a reasonable time for applying to set aside the writ and then sealing the appearance with an entry that the appearance is to stand as **unconditional unless** the defendant makes the application within the prescribed time has no statutory authority and cannot limit the power of the Court to enlarge the time for objecting to the jurisdiction. The meaning of the practice, which is necessary to prevent the hands of the Court from being tied up indefinitely by a formal protest, is merely **that the omission of the defendant to apply to set aside the writ within the prescribed time raises a presumption against him of waiver of the objection to the jurisdiction** and entitles the officials of the Court in the ordinary course to treat the appearance as absolute.

(Emphasis supplied)

In view of the foregoing I agreed with the respondents’ Counsel on the effect of entry of unconditional appearance by the appellants.

(ii) *Jurisdiction of Malaysian Court as conferred by s. 23(1) of the Courts of Judicature Act 1964.*

Counsel for the respondents also drew the Court’s attention to s. 23(1) of the Courts of Judicature Act 1964, which governs the civil jurisdiction of Malaysian Court. The said section reads:

23(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where -

- (a) the cause of action arose, or
- (b) the defendant or one of several defendants resides or has his place of business, or
- (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
- (d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court ...

Counsel submitted that paras. (a) to (d) must be read disjunctively. In support thereof he referred to *Lam Kok Trading (supra)* which clearly showed that for the Court to assume jurisdiction either one of paras. (a) to (d) must apply. Reliance was also placed on *Malayan Banking Bhd. v. International Tin Council and Another Appeal* [1989] 1 CLJ (Rep) 87 where the Supreme Court held:

- a** (1) ... 23(1)(b) of the Courts of Judicature Act 1964, provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents.
- (2) ... and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. There can be no doubt that Parliament intends to confer on the High Courts extra-territorial jurisdiction in cases where more than one defendant are being sued, so long as one of the
- b** several defendants resides or has his place of business within Malaysia.

These two cases clearly showed that the paras needed to be read disjunctively.

It was not disputed that at all material times the appellant was resident in Kelantan, which met the requirement laid down in s. 23(1)(b) of the Act - see again *Malayan Banking Bhd. v. International Tin Council and another appeal (supra)*.

- c** Counsel also referred to *Elf Petroleum S.E. Asia Pte. Ltd. v. Winelf Petroleum Sdn. Bhd.* [1986] 1 MLJ 177 where the High Court held relying on an English case of *The Fehmarn* [1957] 2 All ER 707 that even though the parties had agreed that Singapore law could govern any dispute, that did not oust the jurisdiction of the Malaysian Court to try an action arising out of the agreement.

- d** As could be gathered from the respective affidavits filed by both parties the facts as highlighted by the respondents' Counsel for which I saw no reason to disagree showed:

- (1) Many of the transactions were made pursuant to telephonic communications between the parties.
- e** (2) All the bills or invoices were made out in Malaysian currency.
- (3) All payments were made in Malaysian currency.
- (4) The defendant had by her letter dated 15 November 1987 addressed to plaintiffs' solicitors admitted liability for the sum of RM209,275 and pursuant thereto had paid the plaintiffs the sum of RM5,000.
- f** (5) The defendant acted in breach of her agreement dated 15 November 1987, in failing to honour her undertaking to pay the plaintiffs.

- I would pause here to elaborate on the facts as highlighted in (4) above. As stated earlier the appellant's Counsel alleged that the letter dated 15 November 1987 was not made on the appellant's own volition. However having gone through the affidavits I was not satisfied that there was evidence or sufficient evidence to support any allegation of impropriety though
- g** I accepted the said letter was prepared by a staff of the respondents' solicitor's firm. Be that as it may I did not think there was any wrong for the letter to be prepared by such staff in the absence of any evidence of coercion or inducement. In fact I would add that if at all there was any truth in the allegation I would not expect the appellant to effect the initial payment of RM5,000.

- h** It was therefore clear to me from the facts as highlighted above that both parties never intended to abdicate the jurisdiction of Malaysian Court.

- The facts and authorities as discussed above provided strong support for holding that Malaysian Court had jurisdiction to determine the claim. I also held that the respondents had a *prima facie* right to choose where to file the suit - The choice should not be interfered with except perhaps on clear ground of injustice or inconvenience which I failed to see any.
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